LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 25 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 493

NATHAN SHAVIN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EUGENE GRESSMAN
1730 K Street
Washington, D. C.

WILLIAM T. KIRBY
One North La Salle Street
Chicago 2, Illinois

ANNA R. LAVIN
209 South La Salle Street
Chicago 4, Illinois

Counsel for Petitioner

September 25, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Petition for a Writ of Certiorari:	
Citation to opinion below	1
Jurisdiction	2
Questions presented	2
Statute and rule involved	3
Statement of the case	3
1. The proof as to the violations of § 7201	4
2. The denial of the motion to suppress	12
Reasons for granting the writ	15
1. Important questions in the administration of the criminal tax evasion statute have been resolved by the court below in a manner conflicting with the statutory definition of a crime and with the relevant decisions of this Court and other federal appellate courts	15
A. The conflict as to the Government's duty to develop and calculate known deductions	16
B. The conflict as to the exclusion of petitioner's summary evidence	19
C. The conflict as to the corroboration necessary as to petitioner's admissions	22
2. An important question in the administration of Criminal Procedure Rule 41(e) has been raised by the decision below	24
Conclusion	26
Appendix (Opinion and judgment of Court of Appeals)	1a

CITATIONS

Cases: Page

Agnello v. United States, 269 U.S. 20 25
Alker v. United States, 260 F. 2d 135 (C.A. 3) 23
Amos v. United States, 255 U.S. 313 25
Beck v. United States, 298 F. 2d 622 (C.A. 9) 17
Elwert v. United States, 231 F. 2d 928 (C.A. 9) 17
Gallegos v. United States, 237 F. 2d 694 (C.A. 10) 26
Gouled v. United States, 255 U.S. 298 25
Holland v. United States, 348 U.S. 121 18
Jones v. United States, 362 U.S. 257 25
Jones v. United States, 282 F. 2d 745 (C.A. 4) 16
Myres v. United States, 174 F. 2d 329 (C.A. 8) 19, 21
Nardone v. United States, 308 U.S. 338 25
Opper v. United States, 348 U.S. 84 ..... 22, 23
Salem v. United States Lines Co., 370 U.S. 31 19
Small v. United States, 255 F. 2d 604 (C.A. 1) 16
Smith v. United States, 348 U.S. 147 ..... 22, 23
Spring Co. v. Edgar, 99 U.S. 645 19
United States v. Caserta, 199 F. 2d 905 (C.A. 3) 19, 21
United States v. Gordon, 242 F. 2d 122 (C.A. 3) 15
United States v. Johnson, 319 U.S. 503 ..... 15, 19, 20, 21
United States v. Link, 202 F. 2d 592 (C.A. 3) 17
United States v. Lipshitz, 132 F. Supp. 519 (E.D. N.Y.) 25
United States v. Shavin, 287 F. 2d 647 (C.A. 7) 13
United States v. Shotwell Mfg. Co., 355 U.S. 233 22
United States v. Smith, 206 F. 2d 905 (C.A. 3) 17
United States v. Stayback, 212 F. 2d 313 (C.A. 3) 17
United States v. Wheeler, 149 F. Supp. 445 (W.D. Pa.) 25

Statutes and Rules:

26 U.S.C. § 7201 ..... 3, 4, 15, 16
28 U.S.C. § 1732 20
Rule 41(e), Federal Rules of Criminal Procedure 3, 12, 24, 25, 26

Miscellaneous:

Balter, Fraud Under Federal Tax Law (2d ed., 1953) 22
Mertens, Law of Federal Income Taxation (1958) 15, 18, 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

NATHAN SHAVIN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on July 2, 1963.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, affirming the conviction of petitioner, was rendered on July 2, 1963, but has not yet been reported. It is reprinted in the Appendix hereto, p. 1a, *infra*. No opinion was rendered by the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1963. A timely petition for rehearing was denied on July 26, 1963. On August 20, 1963, Mr. Justice Goldberg signed an order extending the time for filing this petition to and including September 25, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a criminal prosecution for tax evasion under 26 U.S.C. § 7201, the Government in proving its *prima facie* case must take into account all acceptable deductions that it can calculate from records available to it without the assistance of the defendant.

2. Whether, in a criminal prosecution for tax evasion under 26 U.S.C. § 7201, the testimony and summaries of the defendant's summary witness may be completely excluded because of certain errors or deficiencies in his examination of financial records.

3. Whether, in a criminal prosecution for tax evasion under 26 U.S.C. § 7201, the Government must corroborate by substantial and independent evidence the receipt of income as reported in the defendant's tax returns and as detailed in lists supplied by the defendant after the institution of a tax investigation.

4. Whether Rule 41(e) of the Federal Rules of Criminal Procedure requires a federal district court, after the commencement of a trial, to hold a hearing and make a determination as to a motion to suppress where newly discovered facts indicating an unconstitutional seizure of documents arise during a hearing on the timeliness of the motion as originally filed on another basis.

STATUTE AND RULE INVOLVED

This case involves 26 U.S.C. Sec. 7201, which provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Also involved in this case is Rule 41(e), Federal Rules of Criminal Procedure:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant . . . The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT OF THE CASE

A two-count indictment charged that petitioner did wilfully and knowingly attempt to evade a part of his federal income tax obligations, in violation of 26 U.S.C. § 7201, by filing false and fraudulent tax returns for

the calendar years 1954 and 1955.[1] Following a jury trial in the District Court for the Northern District of Illinois, Eastern Division, he was convicted on both counts. Petitioner was then sentenced to serve concurrent prison terms of 18 months on each count, and a fine of $2,500 was imposed on each count, such fines to be cumulative. The Court of Appeals for the Seventh Circuit affirmed the conviction.

1. The Proof As To the Violations of § 7201

The petitioner has been a practicing attorney in Chicago, Illinois, since 1926, specializing in the representation of plaintiffs in personal injury cases. It was his custom in pending cases to pay from his own office funds the various doctor, hospital, garage and repair bills of his clients without waiting for a final settlement or other termination of the particular litigation. App. 145-146, 153, 217, 230. When a case was concluded, the client would come to petitioner's office, sign a release, and receive his share of the settlement from petitioner by check. At this point, petitioner would also pay the fee earned by trial counsel, if the case had gone to trial. Petitioner would then forward the release to the insurance company and receive from it a check covering the full award. The remainder of the amount of this check, after deduction of the foregoing payments, was petitioner's fee for services. Such settlement checks, as received, became a part of petitioner's general office funds. It was from a paper compilation of such transactions that petitioner's tax returns were prepared. App. 289.

---

[1] Petitioner and his wife filed joint tax returns. Only petitioner was indicted.

Based upon such compilations, petitioner's tax returns for 1954 and 1955 showed the following figures:

	1954	1955
Gross income: (receipts from settlements, etc.):	$216,106.66	$240,926.76
Business expenses (payments to clients, attorneys, hospitals, doctors, etc., and other office expenses):	—164,272.74	—198,856.30
Deductions and exemptions:	— 18,541.95	— 4,664.90
Net taxable income reported:	$ 33,291.97	$ 37,405.56
Taxes paid:	$ 11,046.00	$ 13,144.95

In 1957 one George Marseille, an Internal Revenue Agent, was assigned petitioner's 1953 income tax return for examination. This examination began in petitioner's office and soon encompassed the 1954 and 1955 returns as well. Petitioner cooperated fully in this examination and supplied Marseille with all of his case files, his cash disbursement books, lists of fees received and work papers for the three years involved.[2] The

[2] Petitioner did not keep his bank deposit slips or cancelled checks. The only retained records of fees and expenses were in the case files which petitioner allowed Marseille to use.

The subsequent indictment made no reference to the 1953 tax return, which had been the original subject of the investigation.

sums of the fees shown on these lists approximated the amounts of $216,107.32 and $240,926.76 shown as gross income on the 1954 and 1955 returns respectively. Govt. Exs. 161, 162, 1, 2.

Almost no effort was made by the Government at the trial to substantiate or corroborate by independent evidence these reported income figures. As to 1954, proof was introduced to support the receipt of fees in the amount of but $12,184.75—or about 5% of the total reported income of $216,107.32. Gov. Ex. 194. As to 1955, the corroboration amounted to $21,673.24—or about 9% of the $240,926.76 reported total. Gov. Ex. 162; App. 355. The remainder of the more than $450,000 of fees reported in these two years was shown solely by reference to lists of named clients and amounts submitted by petitioner after the commencement of the investigation. Although petitioner protested on appeal that the lack of independent corroboration of the receipt of these fees constituted a fatal flaw in the Government's case, the Court of Appeals made no mention of the point.[3]

The Government's proof at the trial was directed primarily at establishing that petitioner had clients other than those indicated in petitioner's lists and that fees were, or should have been, forthcoming from them. A search had been made of various independent records, including court records and the records of insurance companies, for the years in question. App. 100. From this search the Government sought to prove that petitioner had received additional fees that were un-

[3] On appeal a separate "contested issue" was submitted by petitioner in these terms: "2. Whether an extra-judicial admission alone will support a crucial element necessary to proof of the offense charged?" Brief for Appellant in Court of Appeals, p. 13.

reported, making an income understatement of $28,104.50 for 1954 and an understatement of $61,063.91 for 1955. It did so mainly through the testimony of a summary witness, a Revenue Agent named Albert Henkle; he charged petitioner with additional fees of one-third of all the settlements uncovered by the search. See App. 364-370, 385-390. But there was no supporting evidence that petitioner did in fact receive such understated amounts, or that he actually deposited or cashed all the settlement checks in these cases.

Equally critical to the Government's case were the testimony and computations of Marseille. One of his basic assumptions was that petitioner's disbursements and office expenses were simply the amounts shown on Schedule C of petitioner's returns. But Marseille was forced to concede that the 1954 and 1955 cash disbursement books showed expenditures substantially larger than those claimed in the returns. App. 135-136. He further admitted that these were "very good records," App. 122, and that these recorded expenditures "looked acceptable, like ordinary business deductions." App. 28. The disparity in the business expenditure figures as thus revealed by the Government's proof was as follows:

	1954	1955
Amounts conceded to be "acceptable" from the cash disbursement books:	$191,123.74	$200,192.59
Amounts claimed on tax returns:	164,272.74	178,262.73
Additional expenditures thus revealed:	$ 26,851.00	$ 21,929.86

The cash disbursement books in which these additional expenditure figures appeared were prepared and kept by petitioner's bookkeeper, one Louis R. Berk. As a Government witness, Berk showed that each page of these books contained four columns, one of which was headed "Office." App. 163. It was that column that contained the office or business expenditures conceded by Marseille to be "acceptable" and to reflect "very good records."[4] Indeed, Marseille, who had checked these office expense items, testified that he had had copies of the bank statements and thus had checked every expense check to see that it had cleared. App. 126-127.[5]

The other three columns on the pages of the cash disbursement books were headed "Advances", "N.S." (Nathan Shavin), and "Frank" (Frank Hamilton).[6] App. 114. The "N.S." column reflected personal expenses of the petitioner, expenses which were kept entirely separate from the "acceptable" business expenditures posted under the "Office" column. But the fact that the personal expense figures appeared on the same pages as the "Office" expenditures and that some of Berk's testimony referred generally to the pres-

[4] The only item in the "Office" columns of which Marseille was critical was a $25 item charged to investigation. Marseille thought it really was a loan. App. 133.

[5] Marseille made a work sheet, Gov. Ex. 185, for the year 1954 on which he marked off as "O.K." business expense deductions for petitioner in the sum of $180,322.49, which was $18,049.75 more than the deductions claimed in petitioner's 1954 tax return.

[6] Frank Hamilton is an attorney who shares office space with petitioner. They are not partners, although they use the office name of "Shavin and Hamilton." Petitioner pays all office expenses. App. 173, 174, 291.

ence of personal expense items on these pages apparently confused the Court of Appeals, leading to the erroneous statement in its opinion that "some" of the office items "appear on their face to be personal expenses and are not deductible." See p. 5a, *infra*.

As the Court of Appeals noted, see p. 4a, *infra*, deduction of the "Office" expenditures not claimed on the tax returns would have reduced the balance of the alleged 1954 understatement to $43.44 and the balance of the alleged 1955 understatement to $39,108.63. Additionally, the Government's proof showed that some of the insurance company settlement checks—which were used in the Government's computation of unreported income—were not deposited or cashed by petitioner during the tax years in question. These totaled $7,775.00 in 1954[7] and $21,498.40 in 1955. See App. 340, 343, 384, and Govt. Ex. 260.

The trial record, moreover, demonstrated that four trial attorneys who did work for the petitioner during 1955 received a total of $6,193.62 in fees which were not claimed as deductible expenses in petitioner's 1955 tax return.

Based upon all the available records, but without consideration of the "Office" expenditures not claimed or the fees paid to lawyers that were not claimed, yet including settlement checks not shown to have been either deposited or cashed, the Government's summary witness Henkle calculated the understatement of income in 1954 at $28,104.50 and the understatement in 1955 at $61,063.91. App. 340-343. He then computed the

[7] The total uncashed checks for 1954 amounted to $10,825.00, but the Government did not charge to petitioner two of these uncashed checks in the amounts of $1,7500.00 and $1,300.00. Govt. Ex. 260.

corrected tax liabilities in the amounts of $26,987.93 for 1954 and $52,528.02 for 1955. App. 342, 344. These calculations were premised on the assumptions (1) that petitioner was entitled to a one-third fee of all settlements not reflected in petitioner's records, (2) that he actually received and deposited the settlement checks so as to permit him to receive such supposed fees during the tax years, (3) that the gross income from fees reported in the tax returns was fully authenticated and corroborated, (4) that the petitioner had no business expense deductions other than those reported in the tax returns, and (5) that all alleged discrepencies and infirmities in the records were to be resolved against petitioner.

In short, Henkle discriminated against, selected, assumed and eliminated evidence as he saw fit. He did far more than summarize. And his assumptions and calculations were all reduced to writing and introduced as exhibits for the use of the jury. Govt. Exs. 260-262, 270-272. These neat packages of calculations enabled the prosecutor to tell the jury that it need not decide whether there was added income and added tax due; all of this had been done for the jury by the Henkle summaries. Tr. 1969-1979.[8]

When petitioner sought to introduce testimony and summaries of an expert to counter the damaging testimony of Henkle the effort was rebuffed. App. 437-

[8] The charge to the jury merely stated that these summaries "are not actual evidence, but they are admitted as summaries of other evidence in the case, and they are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize." App. 502. No effort was made to warn the jury with respect to the assumptions underlying the summaries or the resolutions of contested issues reflected in the summaries.

440. The District Court ruled that petitioner's summary witness, Joseph DeLavan, "was not qualified as an expert," App. 437, despite the fact that he was a certified public accountant and a practicing attorney.[9] DeLavan had prepared summaries which took into account the evidence regarding the additional business expense deductions and the deficiencies in proof as to the added income—thereby refuting the conclusions drawn by Henkle as to the alleged understatements of income. Def. Exs. 16, 17, 18. But the District Court, in the presence of the jury, characterized these summaries as "highly unfair" and misleading, sustained the objection to their introduction, and struck all of DeLavan's testimony relating to them. App. 437. Such action was taken, said the District Court, as "a proper exercise of the discretion of the trial court." App. 437.[10] And the Court of Appeals ruled that this discretion

[9] DeLavan was also a member of the Illinois Society of Public Accountants and the American Institute of Certified Public Accountants. App. 393, 396. He had attended all court sessions save one (the testimony of which he read) and heard all the witnesses preceding his own appearance. App. 397.

[10] The District Court also considered DeLavan "loose in his testimony," App. 437, because one of his summaries referred to 1953 items not involved in the case. But that summary, Def. Ex. 18, had merely included a total, from an adding machine tape, of a column from a book already in evidence. App. 410, 417. In any event, the Court of Appeals approved the action of the District Court in permitting the Government to introduce, over petitioner's objection, evidence as to the 1953 return. See p. 10a, *infra*. In light of that fact, DeLavan's incidental reference to some 1953 figures cannot be described as "loose."

The only error appearing in DeLavan's testimony concerned a minor discrepancy of $97.95 in a footing shown by certain books in the record. But this error stemmed from the books themselves rather than DeLavan's summary or testimony. App. 412, 441.

had not been abused since petitioner "failed to make the sufficient proof that these [added] expenses were business expenses, as it was his burden to do." See p. 7a, *infra*.

The Court of Appeals not only approved the exclusion of petitioner's summaries but expressly approved the admission of the Government's summaries. These summaries, said the Court, disclosed the Government's "version of the case, and properly omitted the claimed expenses which the defendant contends should have been deducted." See p. 8a, *infra*.

With respect to the contention that the Government had failed to demonstrate a prima facie tax due for the years 1954 and 1955 because of the failure to take into account the demonstrated additional expenses, the Court of Appeals concluded that (p. 6a, *infra*):

> "The rule which requires the Government to investigate and present evidence upon the claimed deductions applies in the case where the Government proves its case under the net worth theory but not where the proof is made by establishing specific items which were not reported as income as in the instant case."

2. The Denial of the Motion To Suppress

While on the stand during the first day of the trial, Marseille began to testify about certain lists of clients and fees which he said had been copied from lists delivered to him by petitioner. Counsel for petitioner immediately moved, under Rule 41(e) of the Federal Rules of Criminal Procedure, to suppress these lists on the ground that petitioner had not voluntarily delivered them to Marseille. App. 36. The lists were critical to the Government's proof as to income received by petitioner from fees.

The District Court excused the jury and held a hearing limited to a determination of the timeliness of the motion. It concluded, and the Court of Appeals later concurred, that under the circumstances petitioner or his counsel must have been aware of the grounds for the motion—as it was first framed—long prior to trial; hence the motion was held to be untimely under the provisions of Rule 41(e).

During the hearing, however, certain new facts were revealed that altered the whole thrust of the motion to suppress. These facts assumed critical importance in light of a prior indictment and prosecution of petitioner for mail fraud. On November 5, 1956—preceding the institution of the tax inquiry—petitioner had been indicted on charges of defrauding insurance carriers by use of the mails. Petitioner, in submitting medical bills to the insurance companies in connection with settlement negotiations on behalf of clients, allegedly altered and raised the medical fees actually charged by the doctors. A jury was unable to agree to a verdict at the first trial in 1959. A second trial in 1960 resulted in a conviction on two counts, but the cause was reversed and remanded for a new trial by the Court of Appeals for the Seventh Circuit. *United States* v. *Shapiro*, 287 F.2d 647. The then remaining counts of the mail fraud indictment were dismissed on the Government's motion, however, after the tax evasion indictment was returned.

At the instant hearing on the motion to suppress, Marseille gave additional testimony. He there revealed several significant facts theretofore unknown to petitioner or his counsel: (1) the fact that Marseille, in his investigation of petitioner's files, was particularly

interested in the records involving doctors' bills, records which went to the very heart of the then pending mail fraud case;[11] (2) the fact that Marseille at this time (1957) was in close contact and collaboration with the criminal or intelligence division of the Internal Revenue Service;[12] and (3) the admission that Marseille had deliberately concealed from petitioner and his counsel any information concerning these contacts with the intelligence division.

Upon learning these facts, petitioner's counsel amplified the original motion to suppress. App. 86-87. A request was made for a full hearing to determine the extent to which Marseille had been working with the intelligence division and to determine the extent to which Marseille's search of petitioner's files in March of 1957 was really an effort to discover evidence for the mail fraud trial. The District Court refused to permit such a broadened inquiry, insisting that the only matter at stake was the timeliness of the motion to

---

[11] In Gov. Ex. 185, one of the exhibits petitioner sought to suppress, Marseille had listed 85 items relating to doctors' bills. App. 101. Marseille conceded that such listings were not for purposes of calculating possible business expense deductions. App. 102.

[12] Particularly ominous and left unexplained was a note dated March 15, 1957, in Marseille's handwriting, referring to a conference he had had with his superior and with two agents of the intelligence division. App. 60. The note stated in part that the conference had "resulted in agreements that I should continue the investigation and examine case files to determine gross fees and reconcile differences. It was thought because of indictment that Mr. Nathan Shavin would be more or less non-cooperative to go along with it." Def. Exs. 1b and 13. The only indictment outstanding at the time this note was written was the mail fraud indictment.

suppress.[13] Finding the motion in its original form to be untimely, the court denied the motion. App. 93. Thus the effort to expand the motion, in light of the new information developed at the hearing, to inquire into the broader constitutional problems of search and seizure was entirely frustrated.

The Court of Appeals likewise ignored the attempt to expand the motion to suppress. It simply affirmed the District Court's action in denying as untimely the motion in its original form "at the time it was presented." See p. 10a, *infra*.

REASONS FOR GRANTING THE WRIT

1. IMPORTANT QUESTIONS IN THE ADMINISTRATION OF THE CRIMINAL TAX EVASION STATUTE HAVE BEEN RESOLVED BY THE COURT BELOW IN A MANNER CONFLICTING WITH THE STATUTORY DEFINITION OF A CRIME AND WITH THE RELEVANT DECISIONS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS.

The focus of this case is the language of 26 U.S.C. § 7201, which imposes criminal penalties on "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof." The crime thus defined is one of tax evasion or understatement of tax obligations. *United States* v. *Johnson*, 319 U.S. 503, 515.[14] And a prerequi-

---

[13] While the District Court reiterated that the hearing was confined to the timeliness question, it nonetheless found that the delivery of the lists was voluntary on petitioner's part. That was the issue raised in the original form of the motion before amplification.

[14] "But no prosecution for *willful attempt to evade or defeat a tax* is possible unless there is some tax due." 10 Mertens, Law of Federal Income Taxation, § 55A.06 (1958); emphasis in original. And as noted in *United States* v. *Gordon*, 242 F. 2d 122, 125 (C.A. 3), "The filing of a false report or return is not even an essential element of the crime."

site to a determination of a tax evasion or understatement "is the establishment of taxable income." *Small* v. *United States,* 255 F.2d 604, 606 (C.A. 1). Proof is therefore essential "to show that *full and proper returns* would have resulted in larger tax obligations than those shown in the returns actually filed." *Jones* v. *United States,* 282 F.2d 745, 74[illegible] (C.A. 4); emphasis added.

The court below, however, ignored or misconceived the fundamental nature of a § 7201 crime. It has held that the Government, in a specific item case, need not take into account unclaimed but "acceptable" business expenses discovered in the Government's investigation without the aid of the taxpayer. It has held that a mere showing of unreported receipts—quite apart from their setting in a reconstructed "full and proper" return—is enough to convict one of failing to pay a tax due and owing. And it has held that this petitioner is precluded from rebutting such failure to prove an unpaid tax obligation through the presentation of an expert witness. As a result, the principles utilized in affirming petitioner's conviction are at war with the statutory concepts, with the guidelines established by this Court and by other federal appellate courts, and with the principles of fair judicial procedure.

A. The Conflict As To the Government's Duty To Develop and Calculate Known Deductions

The court below, in approving the prosecution's failure to develop and calculate other known business expense deductions available to petitioner, held that the Government's duty to investigate and present evidence upon the claimed deductions "applies in the case where the Government proves its case under the net worth

theory but not where the proof is made by establishing specific items which were not reported as income as in the instant case." See p. 6a, *infra*. The essence of the ruling is that, in a specific item case, the Government need only show unreported income in satisfying its burden of proving that a full and proper tax return would have resulted in larger tax obligations.

Such a holding is completely inconsistent with the statutory concept that the proof of the tax understatement must come from a calculation of the tax due on a full and proper return. A full and proper return, of course, means a return reflecting not only all known receipts of income but all known deductions. In other words, the Government in proving its *prima facie* case must show not only unreported income but must allow "the deductions claimed by the defendant in his return and others that it can calculate without his assistance." *Elwert* v. *United States*, 231 F. 2d 928, 933 (C.A. 9). As stated in *Beck* v. *United States*, 298 F. 2d 622, 632 (C.A. 9), a *prima facie* case is established only after "the government proves unreported receipts by a taxpayer, has allowed all deductions claimed in the taxpayer's return, [and] has allowed all deductions developed and discovered in the government's investigation." Accord: *United States* v. *Link*, 202 F.2d 592, 593 (C.A. 3); *United States* v. *Smith*, 206 F.2d 905, 910 (C.A. 3); *United States* v. *Stayback*, 212 F. 2d 313, 317 (C.A. 3). The square conflict between the decision below and those of the Ninth and Third Circuits in these cases warrants plenary review of the problem by this Court.

This burden of calculating and allowing deductions that have been discovered without the assistance of the

defendant is one that applies in any tax evasion case, be it a net worth case or a specific item case. It is a burden different and distinct from the Government's duty in net worth cases to "track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked." *Holland* v. *United States*, 348 U.S. 121, 135-136. And it is a burden unlike that which shifts to the defendant to prove that he had other allowable deductions which were not shown on his return and which were not discovered by the Government's investigation.[15] What the court here overlooked was the Government's statutory responsibility, in proving its *prima facie* case, of reconstructing the fullest and most proper return possible from the evidence available to the Government without assistance from the defendant. Only after such a reconstruction can there be *prima facie* proof of a tax understatement.

In this case the Government had available to it, without aid or leads from the petitioner, evidence from its investigation of petitioner's records, evidence which indicated that substantial business expense deductions had not been claimed on the tax returns. Concededly, these expenses appeared to be "acceptable" and were traceable to "very good records." Had they been utilized in the Government's reconstruction of the proper tax returns, the balance of the income understatements for the two tax years would have approached the vanishing point and the impact on the jury would

---

[15] "Once the Government establishes unreported income of the defendant and allows deductions claimed by him in his tax return and others that it can calculate without his assistance, the burden is on the defendant to prove that he had other allowable deductions which were not shown on his return." 10 Mertens, Law of Federal Income Taxation, § 55A.27, p. 107 (1958).

have been incalculable. Combined with other deficiencies in the Government's proof, such a reconstruction might well have convinced the jury of petitioner's innocence.

The obvious and continuing importance of this problem, together with the irreconcilable conflict between the decision below and the aforementioned decisions of the Ninth and Third Circuits, makes appropriate the grant of certiorari.

B. The Conflict As To the Exclusion of Petitioner's Summary Evidence

The ruling of the court below that the District Court, while properly admitting the summaries of the Government's expert, did not abuse its discretion in striking all the testimony and written summaries of petitioner's summary witness directly conflicts with the principles established by this Court in *United States* v. *Johnson*, 319 U.S. 503, and with the decisions in *United States* v. *Caserta*, 199 F.2d 905 (C.A. 3), and *Myres* v. *United States*, 174 F. 2d 329 (C.A. 8).

Trial judges have broad discretion in matters of admission and exclusion of expert evidence, *Spring Co.* v. *Edgar*, 99 U.S. 645, 648, but this discretion is not unlimited, particularly where the subject of the expert's testimony is not within the common understanding and comprehension of the jury members. Cf. *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35. Especially must such discretion be circumscribed where, as here, the vital issue in the trial, and the one to which the experts address themselves, involves the reconstruction of complicated financial data and the computation of the tax consequences arising therefrom.

The premise of this exclusion of summary evidence was twofold: (1) the petitioner had failed to prove that the additional expenses were business expenses; and (2) the summary witness had failed to check properly certain items in his summaries. See p. 7a, *infra*. The first point is misplaced, since the Government witnesses had conceded that these items were "acceptable" business expenses. App. 28. The books in which these disbursements had been recorded were compiled in the usual and ordinary course of business; thus they were competent under the "shop book" statute, 28 U.S.C. § 1732. The problem was one of demonstrating the error of the Government's failure to take these expenses into account in reconstructing the "full and proper" tax returns. The second point relied upon by the Court of Appeals at best goes to the weight and sufficiency of the witness' testimony, not to its admissibility.[18] Indeed, to exclude such testimony because of some supposed defects therein is to invade the province of the jury and to deprive petitioner of his right to present his version or analysis of the complicated financial data for the jury's consideration.

It is precisely at this point that this Court's opinion in the *Johnson* case becomes controlling. The rejection of petitioner's summary evidence was based on what this Court condemned in *Johnson*—the assumption "that juries are too stupid to see the drift of evidence" and the notion that the jury otherwise "must accept

[18] Cf. the tolerant ruling of the District Court with respect to objections to the testimony of the Government's summary witness (App. 357): ". . . it may well be that a witness makes errors in summarizing, errors in making computations as a result of erroneous summaries, but it seems to me that an objection along that line, if there is any . . . goes to the weight of the document."

the calculations of the . . . [petitioner's] expert any more than that they were bound by the calculations made by the . . . [Government's] expert based on the . . . [Government's] assumptions of the case." 319 U.S. at 519. Exclusion thus becomes improper, under the *Johnson* view, so long "as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's." *Ibid.*

As expressly held in *United States* v. *Caserta*, 199 F. 2d 905, 908-909 (C.A. 3),

> . . . if the government is to be permitted to endeavor to establish a taxpayer's criminal responsibility through expert testimony, the privilege of combatting that testimony by expert testimony on his side is open to the defendant. This is a matter of common fairness and common sense—the defendant is entitled to an expert witness on any points on which the prosecution was entitled to the use of expert testimony.

And as held in *Myres* v. *United States*, 174 F. 2d 329, 336 (C.A. 8), there is

> . . . no reason why a jury should be deprived of any assistance that an expert witness can give. Whether the views of . . . [the Government witness] or those of . . . defendant's expert, as to proper exclusions or inclusions in computing the defendant's income taxes for the years in suit were to be accepted, was for the jurors to decide for themselves.

Denial of petitioner's right to present a summary witness, in the circumstances of this case, was a denial of what the Third Circuit called "common fairness and common sense" and has created what this Court warned

against in *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 244—"a one-way street" in the fair administration of justice. To the extent that determination and computation of both income received and deductions allowable was a jury function, such a denial foreclosed to the jury an important facet of information and analysis appropriate to an intelligent resolution of the financial issues.[17] The conflict that has arisen over this important question warrants review by this Court.

C. The Conflict As To the Corroboration Necessary As To Petitioner's Admissions

In *Smith* v. *United States*, 348 U.S. 147, 155, this Court held that the rule requiring corroboration of a defendant's extra-judicial admission applies to tax evasion cases, at least where "the admission is made after the fact to an official charged with investigating the possibility of wrongdoing, and the statement embraces an element vital to the Government's case." Such corroboration, as was made clear in *Opper* v. *United States*, 348 U.S. 84, 93, "must consist of substantial evidence, independent of the accused's extra-judicial statements."

In the instant case the petitioner had shown on his returns gross income in 1954 of $216,107.32 and gross income in 1955 of $240,926.76. It thus became essential, in demonstrating a *prima facie* case, for the Government to prove that such income had in fact been received during the years in question. And it attempted to do so through certain lists detailing the sources of this income, lists which the District Court found had

---

[17] See, generally, Balter, Fraud Under Federal Tax Law, p. 448 (2d ed., 1953); 10 Mertens, Law of Federal Income Taxation, § 55A.22, p. 89 (1958).

been delivered by petitioner to the tax investigators. Except for independent corroboration to the extent of $12,184.75 in 1954 (5% of the total) and $21,673.24 in 1955 (9% of the total), these lists constituted the sole proof of income to the petitioner in excess of $450,000.00.

The attempt to corroborate these lists to the extent of 5% and 9% is feeble indeed. And the lists are readily identifiable as a key part of the case. The understatements of income as alleged by the Government witnesses and as affirmed by the Court of Appeals amounted to 10% and 20% of the gross income during the respective years. Much thus remained unproved by independent evidence. As the Court said in the *Smith* case, 348 U.S. at 155, "An admission which assumes this importance in the presentation of the prosecution's case should not go uncorroborated."

The vital nature of these lists in the presentation of the prosecution's case is clear. Equally clear is the substantial failure to corroborate those lists or admissions by independent evidence.[18] The refusal of the Court of Appeals to insist upon such corroboration, a matter which was urgently pressed upon it, directly conflicts with this Court's rulings in the *Smith* and *Opper* cases and justifies corrective review action by this Court.

---

[18] Cf. *Alker v. United States*, 260 F. 2d 135 (C.A. 3). That case involved a lawyer-defendant charged with having understated his income from fees. But the corroboration of the receipts was close to 100% and such corroboration took the form of independent evidence, such as cancelled checks, vouchers and testimony of witnesses.

2. AN IMPORTANT QUESTION IN THE ADMINISTRATION OF CRIMINAL PROCEDURE RULE 41(e) HAS BEEN RAISED BY THE DECISION BELOW.

The holding that petitioner's motion to suppress was untimely under Rule 41(e), despite the development at the hearing of previously unknown grounds for the motion, raises a most serious problem in the administration of criminal justice in the federal courts.

Rule 41(e) provides that a motion to suppress the use of property illegally seized "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." Acting under the last clause of the Rule, the District Court here exercised its discretion to entertain the motion during the trial. But the motion was entertained only in its original form and, on the basis that the grounds for the motion as originally made had been long known to petitioner or his counsel, the motion was denied as untimely.

Completely overlooked by both the District Court and the Court of Appeals was the effort to amplify the motion on the basis of testimony revealed at the hearing, testimony as to facts not previously known to petitioner and completely unrelated to the grounds underlying the motion as first made. Indeed, the facts which came to the attention of petitioner at this hearing were of a most serious nature; they indicated the possibility of an illegal or unconstitutional search having been made of petitioner's records, in collaboration with intelligence officers, in order to uncover evidence of a mail fraud crime unrelated to the tax inquiry. If that possibility were borne out, substantial questions as to the validity of such a search by stealth and deceit and the admissibility of the seized documents would be

present. See *Gouled* v. *United States*, 255 U.S. 298; *Nardone* v. *United States*, 308 U.S. 338.[19]

To preclude consideration of an amplified motion addressed to such critical problems and to premise a denial of the motion on the untimeliness of the original version is to rigidify Rule 41(e) into "a narrow, finicky procedural requirement"—a requirement rejected by this Court in *Jones* v. *United States*, 362 U.S. 257, 264. Where important rights under the Fourth and Fifth Amendments may be at stake, "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." *Gouled* v. *United States*, 255 U.S. 298, 313; and see *Agnello* v. *United States*, 269 U.S. 20, 34-35.

Where, as here, facts come to light which warrant a motion to suppress on constitutional grounds, a proper interpretation of Rule 41(e) would permit and indeed require a hearing on that motion at the time the defendant is first made aware of the grounds. See *Amos* v. *United States*, 255 U.S. 313, 316-317. What was said in *Gouled*, 255 U.S. at 312-313, with respect to an analogous procedural rule then in effect, is equally appropriate to Rule 41(e):

> While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the

[19] See *United States* v. *Lipshitz*, 132 F. Supp. 519 (E.D.N.Y.), and *United States* v. *Wheeler*, 149 F. Supp. 445 (W.D. Pa.), relative to the validity of a search by revenue agents for evidence relating to another crime. As was said in the *Wheeler* case, 149 F. Supp. at 450, "To secure evidentiary matter without making such disclosure when [other] criminal wrongdoing is suspected constitutes a fraud and deceit upon the taxpayer in violation of his constitutional rights and his right against self-incrimination."

> circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.

As was said in *Gallegos* v. *United States*, 237 F. 2d 694, 697 (C.A. 10), the discretion contemplated by Rule 41(e) "should be liberally exercised in the furtherance of justice."

So vital is this problem in the administration of criminal justice and so contrary is the result below to the principles of the *Gouled* case that review of the matter by this Court is both appropriate and essential.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

EUGENE GRESSMAN
1730 K Street, N.W.
Washington 6, D. C.

WILLIAM T. KIRBY
One North LaSalle Street
Chicago 2, Illinois

ANNA R. LAVIN
209 South LaSalle Street
Chicago 4, Illinois

Counsel for Petitioner

September 25, 1963.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13676

September Term, 1962

April Session, 1963

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

NATHAN SHAVIN, *Defendant-Appellant*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 2, 1963

Before SCHNACKENBERG and SWYGERT, *Circuit Judges*, and PLATT, *District Judge*.

PLATT, *District Judge*. Defendant, Nathan Shavin, was tried to a jury on a two count indictment charging that he did wilfully and knowingly attempt to evade a part of his income tax due and owing the Government, by filing a false and fraudulent income tax return for the calendar years 1954 and 1955 in violation of Title 26 U.S.C. § 7201.

The jury returned a verdict of guilty and the Court sentenced the defendant for a period of eighteen (18) months on each count of the indictment, such sentences to run concurrently; and a fine of $2,500.00 was imposed on each count, such fines to be cumulative. Motions for new trial, judgment for acquittal not withstanding the verdict, and in arrest of judgment were all denied. From this judgment the defendant has appealed.

The defendant and his wife filed joint tax returns. He was licensed to practice law in Illinois in 1926, and maintained offices at 10 North Clark Street, Chicago, Illinois. Most of his law business was in the personal injury field in which he represented plaintiffs. His return for the year 1954 discloses a gross income from business of $216,106.66, less expenses for busniess of $164,272.74, and after deductions and exemptions, a tax of $11,046.00 was paid on the net income of $33,291.97. The tax return for the year 1955 discloses total receipts from business in the amount of $240,910.20 and expenses in the amount of $198,856.30. After further deductions and exemptions a tax of $13,144.95 was paid on the taxable income of $37,405.56.

November 9, 1956, Mr. George Marseille, an Internal Revenue Agent, was assigned the 1953 income tax of the defendant for examination. In February 1957, he procured a consent extending the period of examination from the defendant and his wife. In March 1957, he started his investigation in Mr. Shavin's office. He requested and was given a copy of the defendant's tax returns for the years 1954 and 1955. The defendant also gave him the cash disbursement books, his list of fees received, and work papers for the returns of those years. Mr. Shavin gave him the use of a room in his office. During the course of the investigation Mr. Marseille requested the cash receipts book, but the defendant informed him that he had given him a list of all the receipts for the years 1953, 1954, and 1955; that he did not keep his bank deposit slips nor cancelled checks; and that the only retained records of fees and

expenses were his case files which he allowed Mr. Marseille to use. In June 1957, a search was made in the court records in Cook County, the Chicago Index Corporation, a corporation keeping records of litigation where insurance was involved, and in the records of the various insurance companies to check the payments to plaintiffs in various cases and the payments to their attorneys, Shavin and Hamilton. Mr. Hamilton was not a partner of Mr. Shavin, but was employed by him. From the investigation it was found that Mr. Shavin had understated his income for 1954 in the amount of $28,104.50, and in 1955, $61,063.91.

The defendant in his brief relies upon errors which arise out of the sufficiency of the evidence; ruling on evidence, both admissions and exclusions; failure to grant a hearing on motion to suppress as untimely made; failure to suppress evidence; failure to declare a mistrial for misconduct of the prosecution; erroneous instructions; and the refusal to reassign the cause for trial.

In the oral argument, defendant's counsel has emphasized certain of these errors to which this Court will first give its attention.

The defendant assigns error for the reason that the trial judge denied defendant's motion to recuse himself. Judge Hoffman presided at the trials of the defendant when he was charged with the violation of § 1341, Title 18 U.S.C., commonly known as the Mail Fraud Statute. In the first trial, which ended in July 1959, the jury disagreed, and at the second trial in the spring of 1960 the defendant was convicted but the case was reversed by this Court: *United States* v. *Shavin*, 7 Cir., 1961, 287 F. 2d 647. The defendant insists that since Judge Hoffman twice ruled the evidence was sufficient to permit the case to go to the jury in the previous trials, and since there was fraud again charged in this indictment Judge Hoffman might unconsciously have become prejudiced against the defendant. The de-

fendant's motion was not framed under § 144, Title 28 U.S.C. for change of venue because Judge Hoffman was biased. Whether Judge Hoffman had an opinion as to the guilt or innocence of the defendant, he showed no indication of prejudice either by any remark or ruling. It was his duty to permit the prior case to go to the jury when the Government made a prima facie case. None of the cases cited by the defendant make it mandatory for the presiding judge to disqualify himself under the facts presented here. We believe that in each case the judge should determine on the facts whether he should recuse himself. *United States* v. *Gaattrone*, D.C.D.C., 1957, 149 F. Supp. 240; *Parker* v. *New England Oil Corporation*, D.C.D. Mass., 1926, 13 F. 2d 497; *United States* v. *Valenti*, D.C.D.N.J., 1957, 120 F. Supp. 80. We do not believe that Judge Hoffman committed error in refusing to reassign this case.

The defendant next assigns error that the Government did not discharge its obligation to demonstrate a prima facie tax due for the years 1954 and 1955. The Government made proof that the defendant's returns failed to report fees which he received in 1954 of $28,104.50, and for 1955, $61,063.91. The defendant maintains that the Government should have investigated and considered defendant's expenses which were not included as deductions in his tax returns. These claimed expenses in 1954 amounted to $28,061.06 which left a balance of unreported net income of $43.44, and in 1955 amounted to $22,690.69, leaving a balance of unreported income of $39,108.63. The only proof that these were legitimate expenses of the defendant was that they were placed under the heading "office" in the cash disbursement books by Mr. Berk, who examined the defendant's checkstubs and noted the amounts under the item "office" regardless of whether they were personal expenses or office expenses. Berk came to the defendant's office from time to time to keep the records, and other employees of the defendant also posted expenses in the disbursement book. The defendant's attorneys evidently recognized the

insufficiency of the records when they stated in defendant's brief:

> "The various inadequacies and weaknesses of the 1954 and 1955 system of maintaining records in Shavin's office are no longer a problem because certified public accountants have been keeping records for some years (A. 314) and the part-time bookkeeper Berk, and the lawyer Hamilton, who prepared the returns in question, have worked on no returns subsequent to the 1955 return."

The defendant offered no receipts or cancelled checks to verify these items. Admittedly, some of them appear on their face to be personal expenses and are not deductible. For his position that the Government should have investigated and considered the deductions, the defendant relies upon *Beck* v. *United States*, 9 Cir., 1962, 298 F. 2d 622, certiorari denied 370 U.S. 919. He concludes from this case that the Government was required "[to exhaust] all leads suggested or provided by the taxpayer indicating income and deductions . . ." In *Beck* the taxpayer was charged with the failure to report income obtained by embezzlement. In order for the Government to prove that these funds were received as income and not as legitimate expenses, it was necessary that the Government prove that all funds received as expenses were not for legitimate expenses and therefore were embezzled funds. It is obvious in *Beck* that for the Government to prove a prima facie case it had to investigate and consider all leads provided by the taxpayer, to determine if any of the funds which he had failed to report were actually legitimate expenses.

The defendant also insists that the *Beck* case followed *United States* v. *Stayback*, 3 Cir., 1954, 212 F. 2d 313, certiorari denied 348 U.S. 911, which also required the Government to investigate and consider all of the defendant's deductions. This is refuted when the Court there stated at page 317:

"The crux of the defendant's contention is that the government was charged under the law with the burden of establishing (1) defendant's gross sales were higher than reported; (2) his deductible operating costs; and (3) that his net income (after deduction of his operating costs from gross sales) was in excess of that which he had reported.

"Because of his view that the government was under the burden stated, the defendant made virtually no attempt to establish that his deductible operating costs exceeded those which he reported in his tax returns.

"Defendant has made his bed and he must lie in it. He was wrong in his view that the burden is on the government to establish his allowable operating costs and other deductions.

". . . The government is not required to prove the negative, i.e., that the defendant did not have any other deductions."

Obviously, *Stayback* does not support the defendant's position. The rule which requires the Government to investigate and present evidence upon the claimed deductions applies in the case where the Government proves its case under the net worth theory but not where the proof is made by establishing specific items which were not reported as income as in the instant case. *Swallow* v. *United States*, 10 Cir., 1962, 307 F. 2d 81, certiorari denied 371 U.S. 950. In *United States* v. *Bender*, 7 Cir., 1955, 218 F. 2d 869, certiorari denied 349 U. S. 920, the defendant raised a similar contention that the Government had not proved any additional tax due although it had established unreported income because it made no proof that there were no compensating deductions or exclusions. This Court said at page 871:

"The defendant seems to contend that the Government here must prove all the facts necessary to show unpaid tax on net income in excess of all business costs

and expenses and personal exemptions. But that is not required.

> "The taxpayer's costs and other factors which would lessen his tax liability are peculiarly within his own knowledge. Accordingly, the law has placed upon him the burden of going forward with the evidence once the Government has established receipts in excess of those reported in his income tax return."

The language there used is equally applicable here. When the Government proved the unreported income for the years 1954 and 1955 it established a prima facie case.

This brings forward the next error claimed and emphasized by the defendant, that the defendant's summaries which were prepared by his expert should have been admitted in evidence. The lawyer and accountant, Mr. Joseph DeLavan, who prepared the defendant's summaries, used monthly totals as per "office" column for the years 1953, 1954, and 1955 from the cash disbursement books. He admitted he did not check the various items to determine whether they were legitimate expenses, nor did he check the totals to ascertain if the columns were correctly added. There was evidence that this column contained personal expenses which were not proper deductions. The 1954 summary prepared by Mr. DeLavan showed the defendant's net increase of income to be $43.44, and the summary for 1955 showed defendant's net increase to be $39,108.63. The admission of the defendant's summaries into evidence was in the sound discretion of the trial court. *United States* v. *Bernard*, 7 Cir. 1961, 287 F. 2d 715, certiorari denied 366 U.S. 961. Inasmuch as the defendant failed to make the sufficient proof that these expenses were business expenses, as it was his burden to do, the trial court did not abuse its discretion when it denied the admission of defendant's summaries into evidence.

The trial court properly overruled the defendant's objection to the Government's summaries. Again, the

defendant maintains that it was error to permit these summaries to go into evidence without taking into consideration the claimed additional expenses. Here the defendant relies on *United States* v. *Vardine*, 2 Cir., 1962, 305 F. 2d 60; *Flemister* v. *United States*, 5 Cir., 1958, 260 F. 2d 513. In *Vardine* the Government failed to reduce the defendant's bank account by the amount of outstanding checks and added to the defendant's assets paper gains on old machinery and trucks traded for new equipment. In *Flemister* the Court held it error not to reduce the defendant's net worth by $3,500.00 which the Government admitted to be a valid indebtedness. Since the Government made proof in these cases on the net worth theory the summaries should have reflected these items to decrease the defendant's net worth bulge. In the instant case the Government's proof was not offered on the net worth theory but disclosed that the defendant failed to include specific fees in his reported income. The Government's summaries here disclosed its version of the case, and properly omitted the claimed expenses which the defendant contends should have been deducted. Furthermore, the Court instructed the jury in regard to these summaries as follows:

> "Now, there have been admitted in evidence certain exhibits variously referred to as schedules or summaries. Specifically speaking, these exhibits are not actual evidence, but they are admitted as summaries of other evidence in the case, and they are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize. Exhibits of this nature are permitted where they are based upon voluminous books, records or documents already in evidence in order to assist you, the jury, in determining the ultimate facts upon which such books, records or documents which are in evidence, and summaries are admitted only to assist you in considering that evidence. For that purpose you are entitled to consider them."

With this instruction there was no error in permitting the Government's summaries to go into evidence. *United States* v. *Bernard, supra.*

The defendant further assigns error in that the jury was not fairly instructed and in substance that the Court failed to give an instruction sufficiently informing the jury that the defendant should not be found guilty for any negligent understatements of his income in his returns. The jury was instructed:

> "It is not sufficient for you to find that the return or returns were erroneous, and that there was an intent to file a return that was actually erroneous. You must find the defendant not guilty unless you are satisfied by the evidence, beyond a reasonable doubt, that the defendant had the specific wrongful intent required for a conviction, that is, to say, actual knowledge of the existence of the obligation to pay his tax, and the wrongful intent to evade it.
>
> * * * * *
>
> "I repeat, the attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the government a tax imposed by the income tax laws, which the taxpayer, Nathan Shavin, was obligated to pay to the government. The attempt must be wilful, that is, intentionally done, with the intent that the government should be defrauded of the income tax due from him."

The jury was thoroughly informed on the necessity of proof of wilful violation with intent to defraud the Government of the taxes due, and this should have eliminated a finding of guilty based upon negligence.

There is no merit in the defendant's claim that the Court erred in not suppressing the evidence obtained from the defendant. Rule 41(e) of Federal Rules of Criminal Procedure provides in part:

> "Motion for Return of Property and to Suppress Evidence. . . . The motion shall be made before trial

or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

The indictment was returned March 30, 1961; the trial commenced November 20, 1961, and not until the trial had proceeded into the testimony of the fourth witness did the defendant make a motion to suppress the evidence. The defendant must have known that there was an investigation of his tax returns because he voluntarily furnished his cash disbursement books, lists of fees received, and copies of his 1954 and 1955 tax returns in March 1957. The defendant was represented by counsel during the entire period, although he did change attorneys. Under the circumstances presented the defendant must have been aware of the grounds for his motion to suppress and had a long period of time prior to the trial to file the motion. The trial court was therefore justified in denying the motion to suppress at the time it was presented. *United States v. Sferas*, 7 Cir., 1959, 210 F. 2d 69, certiorari denied 74 S. Ct. 630; *United States v. DiDonato*, 2 Cir., 1962, 301 F. 2d 383; certiorari denied 370 U.S. 917; *Rosen v. United States*, 5 Cir., 1961, 293 F. 2d 938;

The defendant also assigns as error that the Court permitted evidence to be heard as to the 1953 tax return. The purpose of this evidence was merely to show the intent of the defendant to defraud the government of its tax, and the jury was instructed accordingly. This evidence was properly admitted. *United States v. Frank*, 3 Cir., 1957, 245 F. 2d 284, certiorari denied 355 U.S. 819; *Mitchell v. United States*, 3 Cir., 1954, 213 F. 2d 951, certiorari denied 348 U.S. 912.

We have examined the other errors assigned by the defendant and find that they are not of sufficient weight to require comment.

For the reasons stated the judgment must be affirmed.

AFFIRMED.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Tuesday, July 2, 1963.

Before HON. ELMER J. SCHNACKENBERG, *Circuit Judge*.
HON. LUTHER M. SWYGERT, *Circuit Judge*.
HON. CASPER PLATT, *District Judge*.

No. 13676

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

NATHAN SHAVIN, *Defendant-Appellant*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and rule involved	2
Statement	3
Argument	5
Conclusion	12

CITATIONS

Cases:

Elwert v. *United States*, 231 F. 2d 928	5
Flemister v. *United States*, 260 F. 2d 513	7
Kirsch v. *United States*, 174 F. 2d 595	7
Opper v. *United States*, 348 U.S. 84	9
Smith v. *United States*, 348 U.S. 147	9
Swallow v. *United States*, 307 F. 2d 81, certiorari denied, 371 U.S. 950	6
United States v. *Bender*, 218 F. 2d 869, certiorari denied, 349 U.S. 920	6
United States v. *Kiamie*, 258 F. 2d 924, certiorari denied, 358 U.S. 909	7
United States v. *Lipshitz*, 132 F. Supp. 519	10
United States v. *Ward*, 169 F. 2d 460	7
United States v. *Wheeler*, 275 F. 2d 94, certiorari denied, 363 U.S. 828, reversing *United States* v. *Wheeler*, 149 F. Supp. 445	11
Warszower v. *United States*, 312 U.S. 342	8

710-400—63

Statute:

	Page
Internal Revenue Code of 1954, Sec. 7201 (26 U.S.C. 7201)	2, 4

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 41(e)	2, 3, 9

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 493

NATHAN SHAVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a–10a) is reported at 320 F. 2d 308.

JURISDICTION

The judgment of the court of appeals (Pet. 11a) was entered on July 2, 1963. A petition for rehearing was denied on July 26, 1963. On August 20, 1963, Mr. Justice Goldberg granted an extension of time for filing a petition for a writ of certiorari to and including September 25, 1963. The petition was filed on September 25, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government failed to credit petitioner with business expenses to which the record shows he was entitled.

2. Whether the trial court abused its discretion in refusing to admit an expert's summaries on the ground that they were based upon unwarranted assumptions.

3. Whether the government sufficiently corroborated admissions made by petitioner in a list of fees which he voluntarily gave to the Revenue Agent.

4. Whether the trial court abused its discretion in denying as untimely a motion to suppress made on the second day of trial, eight months after the return of the indictment, where the defendant was afforded a full opportunity to show the timeliness of the motion.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Federal Rules of Criminal Procedure:

> Rule 41
>
> SEARCH AND SEIZURE
>
> * * * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in in its discretion may entertain the motion at the trial or hearing.

* * * * *

STATEMENT

On March 30, 1961, an indictment was returned in the United States District Court for the Northern District of Illinois charging petitioner with wilfully and knowingly attempting to evade and defeat a large part of the income tax owed by him and his wife for

the years 1954 and 1955, in violation of Section 7201 of the Internal Revenue Code of 1954 (R. 1, 4–5).[1] Count One charged that he filed a false and fraudulent income tax return with his wife in which he understated their joint net income by $29,638.12 for the year 1954, and wilfully attempted to evade and defeat $16,892.78 in income taxes due for that year. Count Two charged that he failed to report $66,421.54 of joint net income for 1955 and wilfully attempted to evade and defeat $43,365.38 of income tax for that year.

Petitioner was tried before a jury and found guilty as charged (R. 512). He was sentenced to imprisonment for eighteen months on each count, the sentences to run concurrently, and fined a total of $5,000.00 (R. 522–524). The pertinent facts are as follows:

Petitioner is an attorney in Chicago, Illinois, specializing in the representation of plaintiffs in personal injury cases (Pet. 4). In his income tax returns for 1954 and 1955 petitioner admitted gross receipts in the respective amounts of $216,106.66 and $240,926.76 (Pet. 5). On November 9, 1956, Revenue Agent Marseille was assigned to examine his returns (R. 22–23). On March 11, 1957, petitioner voluntarily gave the agent a list of his fees for the years 1953, 1954 and 1955 (R. 23–25), showing the amount of each fee and the client and case from which it was received (R. 96). The totals on the lists were virtually identical to those on the tax returns (R. 97). Further investigation of the records of the Municipal

[1] Citation is to the printed Appendix in the court of appeals which is on file with the Clerk of this Court.

Court of the City of Chicago and of insurance companies revealed that petitioner had received fees in 1954 and 1955 in cases not shown on the lists. Neither the amount of these fees nor the names of the clients appeared on the lists (R. 100). From the testimony of these clients at the trial the jury could have found that the fees they paid petitioner resulted in additional, unreported net income in the amounts of $28,104.50 and $61,063.91 for the years 1954 and 1955, respectively (R. 137–161, 170–171, 193–194, 196–215, 216–219, 222–224, 227–234, 244–260, 261–264, 265–282, 283–287, 305–309, 322–324, 339–344). The unpaid income tax on these amounts totaled $15,941.93 for 1954 and $39,393.07 for 1955 (R. 342, 344).

ARGUMENT

1. Petitioner's first contention (Pet. 15–19) is that the court of appeals erred in holding that the government established a *prima facie* case by proving specific items which were not reported as income. He contends that the government was required "to develop and calculate other known business expense deductions," citing *Elwert* v. *United States*, 231 F. 2d 928, 933 (C.A. 9), where the court said:

> * * * it must be remembered that in a tax evasion case the burden is on the defendant to prove that he had allowable deductions which were not shown in his return once the Government establishes unreported income and allows the deductions claimed by the defendant in his return and others that it can calculate without his assistance.

Assuming that *Elwert* represents a correct statement of the government's burden,[2] the decision below presents no conflict for review by the Court for there is no evidence of any unclaimed deductions nor any basis in the record for the contention that the government had uncovered facts from which it could have calculated such deductions. As the court below pointed out, the evidence to which petitioner refers consists of expenses "placed under the heading 'office' in the cash disbursement books * * * regardless of whether they were personal expenses or office expenses" (Pet. 4a).[3] The record in turn establishes that all the deductible items in the "office" column were totalled at the time petitioner's income tax returns were prepared and included as expenses claimed in those returns (R. 102, 130–131, 136–137, 163–167). Thus, the government's proof is sufficient even if the test stated in *Elwert* had been applied.[4]

2. Also without substance is the contention (Pet. 19–22) that the trial court abused its admitted discretion in excluding the evidence offered by petitioner's "expert," DeLavan. Both his testimony and the sum-

---

[2] But see *Swallow* v. *United States*, 307 F. 2d 81 (C.A. 10), certiorari denied, 371 U.S. 950; *United States* v. *Bender*, 218 F. 2d 869 (C.A. 7), certiorari denied, 349 U.S. 920.

[3] See the admissions of petitioner's bookkeeper (R. 161–163).

[4] Petitioner misreads the record when he suggests (Pet. 7, 8, 16, 20) that the agent testified that the expenditures recorded in the "office" column of the cash disbursement books were "acceptable" business deductions. An examination of the record citation (R. 28) discloses that the agent was specifically making reference to figures other than those in the cash disbursement book and that he testified that all of these expenditures were reflected in petitioner's tax return (*ibid.*).

maries he prepared were based wholly upon totals he had made of the "office" column in the cash disbursement books. DeLavan testified that all he had done was to add together the monthly totals of the "office" column as shown by the cash disbursement books, without analyzing or even examining the individual items; that he had proceeded on the assumption that they were all deductible business expenses. He admitted that if any of the items in that column were not deductible expenses his schedule would be incorrect, that some of the entries pointed out to him by the prosecutor did not appear to be business expenses, and that he had made no attempt whatsoever to eliminate personal items from his computations (R. 402–410). The summaries thus tabulated bore no headings, and defense counsel did not even know what they purported to represent (R. 421–425).

As noted, both deductible and non-deductible items were recorded without discrimination in the "office" column and those which constituted valid business expenses had been fully reflected in the petitioner's income tax returns. In these circumstances, it is apparent that the testimony and summaries were meaningless and misleading and properly excluded. *United States* v. *Kiamie*, 258 F. 2d 924, 933 (C.A. 2), certiorari denied, 358 U.S. 909; *United States* v. *Ward*, 169 F. 2d 460, 462 (C.A. 3); cf. *Flemister* v. *United States*, 260 F. 2d 513, 517; *Kirsch* v. *United States*, 174 F. 2d 595 (C.A. 8).[5]

[5] The statement that the trial court's characterization of DeLavan's summaries as "highly unfair" and "misleading" (Pet. 11) occurred in the jury's presence is not correct. The jury had

3. There is no basis for petitioner's contention (Pet. 22–23) that the government failed to corroborate the admissions contained in the list of fees he gave Agent Marseille. It was obviously one of the alleged errors rejected by the court of appeals by the statement (Pet. 10a) that it is "not of sufficient weight to require comment."

Petitioner's tax returns were admissible as admissions, without corroboration. *Warszower* v. *United States*, 312 U.S. 342, 347–348. The amounts of gross receipts reported therein were virtually identical to those on the list given to Agent Marseille (R. 97). In addition, Agent Marseille personally examined and copied petitioner's closed case files for the years involved in which petitioner listed each day, in order of their receipt, the fees received plus the name of each client and the case number (R. 96–98). Although there were discrepancies between the lists and the contemporaneous files as to the total amount of fees,[6] the names of the clients were the same (R. 377–378). We submit that petitioner's tax returns and Agent Marseille's compilation from the closed case files sufficiently corroborated the admissions in the list of fees to satisfy even the requirements of *Smith* v.

---

been excused during a long colloquy and was brought in after the court's remarks were made, and after the court had expressed the opinion that DeLavan "was not qualified as an expert" (R. 437).

[6] The closed case files showed $6,236.65 more income for 1954 than shown on the lists, and $780.91 more for 1955 (R. 97–98). In calculating the unpaid tax the government expert accepted the lower figure which petitioner used in his tax returns (R. 342, 344).

United States, 348 U.S. 147, and *Opper* v. *United States*, 348 U.S. 84.

4. Finally, there is no substance to petitioner's contention (Pet. 24–26) that the court abused its discretion in denying as untimely his motion to suppress the list of fees and other materials which he had voluntarily given Agent Marseille at the commencement of the investigation. Petitioner made his motion to suppress on the second day of the trial, eight months after the indictment and some four and one-half years after he had voluntarily given the documents to the agent. His stated grounds were that the document "was procured under circumstances that would not permit its admission because we believe it was not turned over to this witness in precisely the form in which he says it was" (R. 36). The court ruled that before it would consider the merits, petitioner would be given "the fullest opportunity" to show that the motion was timely under Rule 41(e) which requires that it "be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion * * *" (R. 46–47).

In the course of the ensuing proceedings, in which defense counsel examined three witnesses, Agent Marseille, the petitioner and petitioner's associate, Hamilton, he developed nothing to support the stated grounds of the motion but claimed to have discovered for the first time that the agent had been particularly interested in records involving doctor bills which went to the very heart of a then pending mail fraud case against petitioner and that the agent had had a con-

versation with two members of the Intelligence Division of the Internal Revenue Service about four days after petitioner delivered the documents (Pet. 13–14). Petitioner suggests now—and argued vigorously at the time of the motion (R. 86–87)—that the purported discovery of these facts satisfied the requirement of timeliness and entitled him to a full hearing to show that the agent, in active collaboration with representatives of the Intelligence Division, had a dual purpose to conduct a routine inquiry into petitioner's tax returns and also (unknown to petitioner) to attempt to obtain evidence for possible use in connection with the pending mail fraud indictment.

The short answer to these claims is that the court found as a fact that "the defendant was aware of the grounds upon which the motion would be made" (R. 93) and that this finding is supported by the record of the full hearing on the motion (R. 35–93).[7] Further, contrary to petitioner's contention, the court did consider the merits of his claim based upon the facts which he states were newly discovered and found that the suggested improprieties in the search had been

[7] The court pointed out that the defendant taxpayer was a practicing lawyer of 31 years' experience and that he had been represented since the indictment by an accomplished criminal lawyer (R. 90–92). It may also be noted that at the outset of the proceedings on the motion to suppress, defense counsel stated that he wished to examine Revenue Agent Marseille to whom petitioner had given the documents "about the status of the investigation, what he told [petitioner] about the investigation at that time, what the discussion was as to the nature of the routine audit * * *" (R. 36). Further, when the court asked for the cases in support of the motion to suppress, defense counsel cited *United States* v. *Lipshitz*, 132 F. Supp. 519

"explained away" (R. 93).[8] In any event, even if the agent had had a dual purpose to inquire into petitioner's income tax liabilities and to help develop evidence for the pending mail fraud case, this would not constitute an invasion of petitioner's constitutional rights. *United States* v. *Wheeler*, 275 F. 2d 94, 97 (C.A. 3), certiorari denied, 363 U.S. 828, reversing *United States* v. *Wheeler*, 149 F. Supp. 445 (W.D. Pa.), relied upon by petitioner at Pet. 25, n. 19.

(E.D.N.Y.) and *United States* v. *Wheeler*, 149 F. Supp. 445 (W.D. Pa.)—the same cases on which he now relies (Pet. 25 n. 19)—for the proposition that "The special agent working in what is known as a joint investigation, worked with the regular revenue agent, and it was said by the court that that was obtainment of things and under circumstances that violated the privilege against furnishing evidence for criminal purposes which the defendant, the taxpayer, had" (R. 43). These statements by defense counsel all occurred prior to the purported discovery of the new facts (see R. 52–53).

[8] It is true that the agent and his superior had one brief conversation with two special agents early in the investigation in March 1957, but those agents stated that they were not interested in the case (R. 65). When the government attempted to show that there had been no further contact between the investigating agent and the Intelligence Division between March 1957, and June 4, 1957 (when that Division entered the case—R. 50), the defense objected and the testimony never went in. In cross-examining the agent, the defense did not touch upon the subject of any such later contacts (R. 65–66).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH M. HOWARD,
BURTON BERKLEY,
Attorneys.

OCTOBER 1963.

U. S. GOVERNMENT PRINTING OFFICE 1963